FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 353

COWLES PUBLISHING COMPANY, *Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

DAVID A. WATTS,
WILLIAM N. HADDAD,
135 South LaSalle Street,
Chicago, Illinois.

WILLIAM V. KELLEY,
1114 Old National Bank Bldg.,
Spokane, Washington.

BELL, BOYD, MARSHALL & LLOYD,
135 South LaSalle Street,
Chicago, Illinois.
of Counsel.

WITHEROPOON, WITHEROPOON & KELLEY,
1114 Old National Bank Bldg.,
Spokane, Washington.
of Counsel.

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On page 4 of its brief, the Board states that the student inserters "*repeatedly* complained to the company's *supervisors* about these matters, but the company did nothing to remedy them (R. 197, 120-121, 156, 332, 367)." Again on page 5 of its brief, the Board states "the employees presented themselves in a body to Edmunds and the other *supervisors* who had come down to the plant * * *" (italics ours). This is an attempt to warp this record into a rigid form of the Board's, unsupported by the facts, outlining that management knew of the alleged dissatisfaction of the stu-

dent-strikers prior to the two-minute meeting of August 23, 1952. Nothing could be further from the truth. An examination of the Board's references show that a few sporadic remarks addressed to a mailing room foreman, Howard Miller, and an acting foreman, Dana D. Crooks, admittedly not members of petitioner's supervisory staff and not "the other supervisors who had come down to the plant" the night of August 23, 1952, constituted the Board's whole case.

Considering the record seriatim as cited by the Board on page 4 of its brief:

R. 197—DIRECT TESTIMONY OF THOMAS P. HOWARD

"Q. Prior to that evening had you spoken to Mr. Miller or Mr. Crooks or Mr. Munkers about the locker room conditions?

"A. I believe that I, I will have to say I don't recall."

R. 120-121—DIRECT TESTIMONY OF PHILLIP M. O'NEILL

"Q. (By Mr. Walker): My question related to the information that you had received that the mailers had received a pay raise in June, 1952, or thereabouts.

"A. I can't recall.

"Q. All right. Now, do you know a Harold App?

"A. Yes.

"Q. And in June of '52 was he an inserter?

"A. Yes.

"Q. Around about June, '52, did you and Mr. App have a conversation with Mr. Crooks?

"A. Yes.

"Q. Where did that conversation take place?

"A. In the mailing room.

"Q. And what was said?

"A. Mr. App asked Mr. Crooks, or rather told Mr. Crooks, that the inserters were talking about asking for a raise, that they were dissatisfied with what they were getting, and asked Mr. Crooks if he knew anything about it and Mr. Crooks said that he would see about it.

"Q. (By Trial Examiner Bennett): When did you say this was?

"A. About, in June sometime, I would say.

"Q. (By Mr. Walker): Did you ever hear from Mr. Crooks about that?

"A. No."

R. 156—CROSS-EXAMINATION OF PHILLIP M. O'NEILL

"Q. What were you supposed to have said to Mr. Crooks?

"A. I didn't say anything. Mr. App said, asked Mr. Crooks, or told Mr. Crooks, that there was

discontent among the inserters, that they felt they should get a raise and wondered if he would see about it, or something to that effect.

"Q. How long a space of time, in how long a space of time did this conversation take place?

"A. Just a minute or so.

"Q. (By Trial Examiner Bennett): I understood you to testify before that Mr. Crooks did not reply.

"A. No, I didn't say that. Mr. Crooks said something like, 'I'll see about it,' or 'O. K.,' or something like that. It was a very short conversation.

"Q. (By Mr. Kelley): What was the occasion of your being there?

"A. We were sitting down and Mr. Crooks happened to walk by and Mr. App said, 'Mr. Crooks, just a moment,' and I was talking with Mr. App.

"Q. And you fellows had been down there to do some work, is that the story?

"A. Yes.

"Q. About what time of the day was this?

"A. I don't recall.

"Q. Was it in the afternoon?

"A. It could have been in the afternoon or morning, it could have been in the evening.

"Q. You have no recollection—and it lasted about a minute, you would say?

"A. Yes.

"Q. There was no other discussion with Mr. Crooks to your knowledge?

"A. No.

"Q. There wasn't any other discussion in any manner, shape or form, with anybody connected with the Cowles Publishing Company subsequent to that time, until August 23, 1952, isn't that correct?

"A. I discussed it with no one. What everyone else did, I don't know.

"Q. I see. But as far as you are concerned, there was no discussion?

"A. Correct.

"Q. That is your best testimony?

"A. Yes."

R. 332—DIRECT TESTIMONY OF JAMES P. MUNKERS

"Q. Did you hear any of the inserters complaining—

"A. (Interrupting): I always hear them hollering about their pay.

"Q. That morning?

"A. I couldn't say it was that morning.

"Q. (By Trial Examiner Bennett): If they had, it wouldn't be unusual?

"A. No, not at all.

"Q. (By Mr. Walker): Prior to August 23, had you heard the inserters complaining about the condition of their locker room?

"A. No, sir.

"Q. You never have heard that?

"A. No, sir.

"Q. From any inserter?

"A. No, sir."

R. 367—DIRECT TESTIMONY OF DANA D. CROOKS

"Q. I see. That Saturday night—I will withdraw that. There has been some talk here or testimony, proffered substantially, that a fellow by the name of Harold App was discussing locker conditions or possible pay raises or both, with Mr. O'Neill, and on one occasion you were walking through the locker room and they buttonholed you about that. Do you recall any such incident?

"A. Not any specific incidents, but they have asked me, several different ones, if we had a locker for them, which we didn't have a locker for all of them, but as far as asking me about more money, I don't remember anything about that."

The above half dozen excerpts from a 463-page record constituted the Board's entire case and are the only

references it can cite in its brief to this Court. If this Court is to grant certiorari, it will, in reviewing the record, perceive that neither these references nor any other part of the record support the assertion that management knew anything at all about the inserters' dissatisfaction. Not only that, but the record will affirmatively show that the management never knew of Exhibit 2 until confronted with it and a 40-minute ultimatum August 23, 1952.

Acting foreman, Dana D. Crooks, who was not a member of petitioner's supervisory staff, testified as follows:

> "Q. Prior to August 23, 1952, Mr. Crooks, had any complaints been made to you by O'Neill, Howard, Riddle, concerning the matters outlined in Exhibit 2 there, that resolution?
>
> "Just take a look at it, if you want.
>
> "Trial Examiner Bennett: It is the second page there.
>
> "A. No, I don't recollect anybody coming to me about that. * * *
>
> "Q. Before or after 7 p. m., August 23, 1952, did you have any knowledge of any meetings of the inserters discussing their working conditions and taking votes and calling for resolutions and things of that nature?
>
> "A. None whatsoever.

"Q. Did you on or before August 23, 1952, ever have any knowledge of any demands for raise in pay or betterment of working conditions or cleaning up the locker room or anything of that character?

"A. No.

"Q. Before or after August 23, 1952, did you ever have any requests from Howard or O'Neill or Riddle or any of those inserters set forth there on Exhibit 2, for meetings to discuss or bargain or both, concerning these matters with the Cowles Publishing Company?

"A. None. * * *

"Q. Directing your attention to Exhibit 2, that being the resolution that Mr. Howard has testified he drew up, did you have any authority to pass on any of those matters set forth in that exhibit?

"A. No, I had not.

"Q. By the way, did you happen to know—when is the first time you ever saw that exhibit?

"A. I think I got a glimpse of it that Saturday night, after I came down, on August 23.

"Q. I see. That Saturday night—I will withdraw that. There has been some talk here or testimony, proferred substantially, that a fellow by the name of Harold App was discussing locker conditions or possible pay raises or both with Mr. O'Neill, and on one occasion you were walking through the locker room and they buttonholed you about that. Do you recall any such incident?

"A. Not any specific incidents, but they have asked me, several different ones, if we had a locker for them, which we didn't have a locker for all of them, but as far as asking me about more money, I don't remember anything about that.

"Q. Was there any distinction and discrimination with respect to the apportionment of lockers or anything like that?

"A. No. The oldest men who had been there longest had the keys and the newer ones who came in, didn't have any locker.

"Q. You had so much locker space and so many lockers, is that right?

"A. That is right.

"Q. You had so much space to put them in?

"A. That is right.

"Q. The first ones that were there had the keys, is that it?

"A. That is right.

"Q. As they got through school or left employment, or at least ceased being inserters, why, the fellows who came later got their keys?

"A. That is right" (R. 363, 365, 366, 367, 368.)

On cross-examination, he testified:

"Q. I take it, Mr. Crooks, complaints by the inserters about their pay rate wasn't unusual, was it?

"A. Well, I have heard them make remarks at different times about, 'Well, we should have a little more money for that,' but I have heard mailers make the same remark.

"Q. Before 6 o'clock on August 23, had any of the men whose signatures appear on General Counsel's Exhibit No. 2, reported to you that they would not work that night?

"A. No, sir." (R. 368, 369.)

Furthermore, if this Court is to review the actual record, it will observe that foreman Howard Miller also testified unequivocally that management never knew of the alleged dissatisfaction of the inserters. He testified as follows:

"Q. In any event, with respect to the activities that have been outlined here by the witnesses, O'Neill and Howard and Riddle, prior to August 23, 1952, did you have any knowledge of any of those discussions on activities?

"A. No, sir.

"Q. Did you ever receive any demands by any of the inserters here, or more specifically, Howard, O'Neill or Riddle?

"A. No, sir.

"Q. Did you ever receive any request for meetings by those, by the inserters named in this cause, that is, the 17, at all?

"A. No, sir.

"Q. More specifically, did you ever receive any request for any meeting with the three inserters, O'Neill, Howard and Riddle?

"A. No, sir.

"Q. In your capacity, at any time or place did you ever receive any requests in any manner, shape or form whatsoever for any collective bargaining or anything of that sort before 7 p. m., August 23, 1952?

"A. No, sir." (R. 292).

No Interference With or Restraint or Coercion of Employees

Interference with or restraint or coercion of employees in the exercise of the rights guaranteed in Section 7, declared an unfair labor practice in Section 8(a)(1), falls for the greater part into one or more of the various types of employer conduct that this record shows was wholly lacking. The record shows no threats, espionage, black-listing, promises of benefit to employees who will resist unionization, attacks on employees, individual employment contracts, employer interference with election of collective bargaining representatives, interference with solicitation of union member-

ship, or refusals to bargain. The case at bar is unique in that its facts show no employer discrimination of any kind.

The Board's Authorities

In reviewing the Board's cited decisions of this Court, petitioner has found none in conflict with the principle for which it is contending, namely, that the acts of precipitous disloyalty on the part of the inserters in the case at bar constituted sufficient cause for their immediate discharge or replacement because of their abandonment of the newspaper coming off the presses.

Petitioner has found no case similar on its facts to the case at bar. This was not a case of discriminatory discharge. This was not a violation of Section 8(a) (3) nor of section 8(a) (5) (R. 53). The other employees in the mailing room were organized union mailers. These part-time student-inserters had to be replaced immediately if the petitioner were to get its newspaper out that evening.

Radio Officers v. National Labor Relations Board, 347 U. S. 17, 74 S. Ct. 323, involved conflicting interpretations by courts of appeal of Section 8(a) (3) in utterly dissimilar fact situations which, however, impelled this Court to grant certiorari.

In *National Labor Relations Board v. Southern Silk Mills,* 209 F. (2d) 155, 210 F. (2d) 824, where this Court denied certiorari, 346 U. S. 818, the rule for which we are contending as enunciated in *National Labor Relations Board v. Local Union No.* 1229, *International Brotherhood of Electrical Workers,* 346 U. S. 464, 74 S. Ct. 172, decided December 7, 1953, was nevertheless recognized. As we read the *Electrical Workers* case, this Court held there that acts of disloyalty on the part of employees constituted sufficient cause for discharge because of the inherent nature of the act, likening such conduct to physical violence, insubordination and breach of contract, which are recognized grounds for lawful discharge.

It is true there was no violence in the case at bar; however, violence is not necessary for illegality. There is a common factual element in "sit-down" and "wildcat" strikes and that is that they conflict with established law. The established law with respect to the inserters was that there was implied in their contract of hiring that they would do the work assigned to them in a careful and workmanlike manner; that they would work so as not to injure the newspaper's business.

It was undisputed that the Saturday night when the strike occurred was the crucial time of the work week; that it was the one time that inserters were required to report for work at 6 p. m. (R. 32) and to remain in

the mailing room itself for the first three editions of the Sunday paper because of the tight train and bus schedules (R. 297, 298).

In *National Labor Relations Board v. Buzza-Cardozo,* 205 F. (2d) 889, certiorari denied 346 U. S. 923, this Court will recall that employees met with management and there was a demand and formal refusal of a wage increase, with the employees giving management at least 24 hours' notice. There the business was manufacturing and selling greeting cards; there was no reason to discharge the employees *instanter* and to fill their places at a later time. In the case at bar we have a strike which had for its immediate purpose the granting of demands within 40 minutes or the shut down of a newspaper.

Finally, we fail to see what comfort the Board can derive from *National Labor Relations Board v. Rockaway News Supply Co.,* 345 U. S. 71, 73 S. Ct. 519, under the unique facts in the case at bar. In the *Rockaway News* case, this Court held that an employee's breach of a provision in a collective bargaining agreement might be sufficient grounds for a discharge. In some extreme instances, such as the case at bar, acts of disloyalty in violation of a contract of hiring should certainly be sufficient.

The advice of the majority opinion in the case at bar:

> "We may add that had Edmunds, instead of summarily discharging these men, merely warned them that respondent would permanently fill their places in event they continued to strike, he would have been on safe ground,"—

was unrealistic. Edmunds had a newspaper coming off the presses at that very instant. As the late Mr. Justice Jackson pointed out in the *Rockaway News Supply* case, "Substantive rights and duties in the field of labor management do not depend on verbal ritual rites of medieval real property law."

CONCLUSION

The evidence did not sustain the conclusion of the Board that management knew of the inserters' activity prior to the discharges. The decisions of this Court indicate there was sufficient cause for the discharges. It is respectfully submitted that the petition for a writ of certiorari should be granted with a consequent reversal of the judgment of the Court of Appeals.

Respectfully submitted,

DAVID A. WATTS,
WILLIAM N. HADDAD,
135 South LaSalle Street,
Chicago, Illinois.

WILLIAM V. KELLEY,
1114 Old National Bank Bldg.,
Spokane, Washington.

BELL, BOYD, MARSHALL & LLOYD,
135 South LaSalle Street,
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of Counsel.

WITHERSPOON, WITHERSPOON & KELLEY,
1114 Old National Bank Bldg.,
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of Counsel.